12/06/01

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Paper No. 14
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Baylor Health Care System

Serial No. 75/095,044

Charles S. Cotropia of Sidley & Austin for Baylor Health Care System.

Laurie A. Mayes, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Walters, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On April 26, 1996, Baylor Health Care System filed an application to register on the Principal Register the mark HEALTHSOURCE for the following goods and services, identified as amended: "printed educational materials covering health care topics" in International Class 16, and "providing health related and health care information through the dissemination of printed material of others" in International Class 42. Applicant claimed dates of first

use and first use in commerce of March 23, 1992 for the goods and services in both classes.[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used on or in connection with its identified goods and services, so resembles the registered mark HEALTH SOURCE for "computer services, namely, providing access to computer databases featuring indexes, abstracts and full text in the health care field" in International Class 42,[2] as to be likely to cause confusion, mistake or deception.

Applicant has appealed, and briefs have been filed, but applicant did not request an oral hearing.

We affirm the refusal to register. In reaching this conclusion, we have followed the guidance of the Court in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

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[1] Applicant claimed ownership of Registration No. 1,610,814, issued August 21, 1990, for the mark HEALTHSOURCE for "entertainment services in the nature of an informational medical television program" in International Class 41. The records of this Office show that registrant's Section 8 affidavit was accepted, and its Section 15 affidavit was acknowledged. However, thereafter, in September 2001, applicant's claimed registration expired due to the failure to file a renewal.

[2] Registration No. 2,073,435, issued June 24, 1997. Registrant disclaimed the term "health." The claimed date of first use is January 1993.

We turn first to a consideration of the involved marks. Applicant argued that there is an "admittedly" fine distinction between its one-word mark HEALTHSOURCE from the cited two-word mark HEALTH SOURCE. However, purchasers would not notice or recall the fine distinction referred to by applicant, and we find the marks are virtually identical in sound, appearance, connotation, and commercial impression.

The fact that the marks are virtually identical "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Indeed, the fact that an applicant has selected the virtually identical mark of a registrant "weighs [so] heavily against the applicant that applicant's proposed use of the mark on "goods...[which] are not competitive or intrinsically related [to registrant's goods]...can [still] lead to the assumption that there is a common source." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688-1689 (Fed. Cir. 1993). "The greater the similarity in the marks, the lesser the similarity required in the goods or services of the parties to support a finding of likelihood of confusion." 3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §23:20.1 (4th ed. 1999).

We turn to a consideration of the cited registrant's services and applicant's goods and services. Applicant's position is that its goods and services ("printed educational materials covering health care topics" and "providing health related and health care information through the dissemination of printed material of others") and the cited registrant's services ("computer services, namely, providing access to computer databases featuring indexes, abstracts and full text in the health care field") are dissimilar because applicant's identified printed materials relate to the basic education of the general public on various health care topics, while registrant's identified computer database with full text stories "must be in-depth articles and information relating to the details of the particular topics addressed," and relate to providing "a sophisticated research tool for exploring the intricate details of the health care issues addressed." (Brief, p. 7.)

Applicant also contends that the purchasers of its goods and services are the general public, while registrant's database is intended for the sophisticated purchaser, i.e., the health care professional or student; that registrant's services require the consumer to have "specialized computer skills" (brief, p. 8); and that the

involved goods and services are sought and purchased with special care because they relate to information and advice relevant to health.

The Examining Attorney argues that the parties' goods and services are closely related because even though the means of dissemination of the information is different, nonetheless, both are for the purpose of providing information on health to the public; and that the involved goods and services travel in the same channels of trade to the same purchasers. In support of her position as to the relatedness of the respective goods and services, the Examining Attorney submitted several third-party registrations, all of which issued based on use in commerce, and all of which specifically involve and relate to the health care field. She offered these third-party registrations to demonstrate that the same company will disseminate information by different means, and specifically, that health care information is provided in both printed and electronic form, by showing that a single entity has adopted a single mark for such goods and services.[3]

[3] See, for example, Registration No. 2,159,802 issued for, inter alia, "printed materials, namely booklets, pamphlets, flyers and brochures in the field of health" and "providing information regarding health-related products via a global computer network"; Registration No. 2,178,995 issued for, inter alia, "publications,

While third-party registrations are not evidence of commercial use of the marks shown therein, or that the public is familiar with them, nonetheless, third-party registrations which individually cover a number of different items and which are based on use in commerce have some probative value to the extent they suggest that the listed goods emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, footnote 6 (TTAB 1988).

Moreover, it is well settled that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an

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namely, newsletters,... featuring information about health..." and "providing a database of information online...regarding women's health"; and Registration No. 2,257,529 issued for, inter alia, "printed materials, namely, a series of books, pamphlets,... in the fields of health or health care" and "providing ... information in the fields of health or health care by ... electronic communications networks."

association between the producers of the goods or services. See In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); and In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Also, it has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is constrained to compare the goods and/or services as identified in the application with the goods and/or services as identified in the registration. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, we find that applicant's goods and services are similar in nature and closely related to registrant's services, as identified. Both parties provide health care and health related information, with applicant providing it through printed materials and registrant providing it via a computer database. There are no restrictions as to purpose, and both are broadly worded identifications of goods and services which overlap.

Further, we disagree that the identifications of goods and services restrict the channels of trade and/or the

intended purchasers in the manner argued by applicant. The restrictions applicant reads into the identifications are not found in a reasonable reading of the respective identifications of goods and services. Because neither party's identification restricts the trade channels or purchasers, the Board must consider that the parties' respective goods and services could be offered and sold to the same classes of purchasers through all normal channels of trade. See Canadian Imperial Bank v. Wells Fargo Bank, supra; In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994); and In re Elbaum, 211 USPQ 639 (TTAB 1981).

With regard to applicant's argument that purchasers are careful when seeking information on health issues, it is not supported by any evidence. Even if we assume there would be some degree of care exercised by consumers, when the virtually identical mark is used on closely related goods and services, consumers are likely to be confused as to the source of the goods and services, despite the care taken. Purchasers may believe that registrant is now providing health information through printed materials, in addition to its computer database of information on health issues.

According to applicant, there have been no instances of actual confusion in seven years of coexistence of applicant's mark and the mark in the cited registration. However, there is no evidence of applicant's and registrant's geographic areas of sales, or the amount of the sales under the respective marks. Further, there is no information from the registrant. In any event, the test is likelihood of confusion, not actual confusion. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (fed. Cir. 1990); and In re Kangaroos U.S.A., 223 USPQ 1025 (TTAB 1984). This factor is not persuasive in applicant's favor in the overall balancing of the du Pont factors in this case.

Finally, applicant argued for the first time in its brief that there are several similar marks registered for goods and services "in the general field of health care." (Brief, p. 13.) The Examining Attorney objected to the additional evidence submitted with applicant's brief requesting that it be excluded. First, applicant's reference to six third-party registrations was untimely pursuant to Trademark Rule 2.142(d). See TBMP §1207.01. Second, mere typed lists of registrations are not sufficient to make them of record. The Board does not take judicial notice of registrations residing in the USPTO.

See In re Duofold Inc. 184 USPQ 638 (TTAB 1974); and In re F.C.F. Inc., 30 USPQ2d 1825 (TTAB 1994). The objection is well taken and this evidence was not considered.[4]

Decision: The refusal to register under Section 2(d) is affirmed.

[4] We note that even if considered the third-party registrations would not alter our decision herein. While applicant argues the six registrations are all for goods or services in the general field of health care, some of the identifications (as typed out by applicant) are in fact, unrelated to health care. For example, "retail bookstore services excluding any publications or other materials or services relating to medical furniture," "distributorship services in the field of groceries," and "dietary supplements in the nature of cholesterol-lowering beverages and soy protein beverages."